Supreme Court, U.S.
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No. 96-844

In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE BRIAN BARNETT DUFF, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

v.

GOVERNOR OF THE STATE OF ILLINOIS, DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, and K.L., L.F. & R.B., on behalf of themselves and all persons similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondents' counterstatement of facts, including its contumelious allusions to "cover-up" and "improper personal stake," neither justify nor support the serious errors the Seventh Circuit committed in its opinion below. Worse, Respondents' contemptuous rhetoric represents a renewed effort to put the District Court on trial while it obfuscates the key legal questions before this Court. These include (1) resolution of the conflict between the decision below and *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147 (1994); (2) the need for clarity and certainty in the law pertaining to the obligations of a federal district court in communicating with court-appointed experts and in facilitating settlements; and (3) the right of a federal trial judge to be heard, on a petition for writ of mandamus, in accordance with the Federal Rules of Appellate Procedure.

I.

Furthering their attempt to derail consideration by this Court of questions of immense importance to bench, bar and litigants, Respondents put forth a mootness argument that has no factual merit, and scant apposite precedent in support.

First, Respondents intentionally misread the Petition as requesting that the underlying case in this matter be reassigned to Petitioner. While that *could* ultimately result from this Court's grant of *certiorari*, that is not the motivating reason why Judge Duff seeks to bring this case before this Court.

Along with more than one hundred Article III, bankruptcy and magistrate judges presently sitting in the Seventh Circuit, Judge Duff will continue, in the management of his cases,[1] to be constrained by the Seventh Circuit's novel and unprecedented definition of "personal knowledge" as used in 28 U.S.C. § 455(b)(1). Thus, he and these hundred other judges must avoid *any* discussion that "touch[es] the merits, or procedures affecting the merits" in *ex parte* conferences held with the consent of the parties, App. 31, lest they be disqualified from further hearing the case.[2] Moreover, the Petitioner, along with all other judges

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[1] Judge Duff's October 10, 1996 request to retire from regular active service for medical reasons, and for reassignment of certain cases, has not removed him from his position as an Article III judge. Indeed, Judge Duff continues to preside over cases, including one involving the State Respondents. *See Pearson v. Edgar*, 86 C 2181 (N.D. Ill.). Furthermore, the formalities associated with the District Court's request have not been completed. Finally, the October 10 orders do not affect or preclude reassignment of the matter underlying this appeal to Judge Duff. The underlying matter was reassigned to another judge on September 4, 1996, predating by more than one month Judge Duff's request and the subsequent reassignment orders of Chief Judge Aspen. The language of the October 10 orders provide no explicit bar whatsoever to reassignment of this matter back to Judge Duff.

[2] The opinion below re-writes Rule 5.00 of the Local General Rules of the Northern District of Illinois, by inserting the mandatory obligation to *require* "the court presid[ing] over settlement talks . . . to arrange for another judge to preside or to refer the task to a magistrate judge." *See* Resp. Br. at 19 n.10. In so doing, the Seventh Circuit appears to have circumvented General Rule 1.01, providing the judges of the Northern District with the authority to "promulgate its rules at their official meetings."

in the circuit, will be confronted in the future with "judge-shopping" disqualification motions for partiality, based upon the Seventh Circuit's rejection of the "fair judgment impossible" test of this Court's decision in *Liteky*. These prospects more than satisfy the requirement that the situation complained of is "capable of repetition, yet evading review," the standard first used in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, 31 S. Ct. 279 (1911).

Second, grant of *certiorari* in this case offers Petitioner the requisite potential for effective relief: repair of the harm done to Judge Duff's judicial reputation by the conclusion of the Seventh Circuit panel, App. 31-34, that he had violated Canon 3A(4) of the Code of Conduct for United States Judges.[3] In *Johnson v. Board of County Commissioners for the County of Fremont*, 85 F.3d 489 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996), the Tenth Circuit rejected a similar mootness argument raised in an appeal by an attorney challenging his disqualification, an appeal brought after settlement of the underlying case. Citing federal authority from the Tenth and Eleventh circuits, the *Johnson* court held:

> These cases establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation. We therefore conclude

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[3] This injury is particularly egregious and unfair in light of the Seventh Circuit's refusal to permit Petitioner to be heard on the charges leveled against him by Respondents. *See* Pet. at 25-29.

> the appeal is not moot insofar as the district court's order found that Attorney Greer had violated the Colorado Rules of Professional Conduct.

Johnson, 85 F.3d at 492-93 (footnote omitted).

Finally, no prior decision of this Court on mootness has involved the challenge of a federal judge to the adoption by a court of appeals of rules on judicial conduct. The public importance of the rules promulgated in this case by the Seventh Circuit, and their future impact upon bench, bar and litigants alike, places this petition in a setting far more akin to that of class actions,[4] or that obtaining in *Southern Pacific Terminal Company*, than in any of the cases cited by Respondents.[5] Under these

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[4] For example, in *Gerstein v. Pugh*, 420 U.S. 103, 111, n.11, 95 S. Ct. 854, 861 n.11 (1975), this Court, in a class action context, rejected a mootness argument even where a decision by the Court would provide no effective relief to the name plaintiff, where a "constant existence of a class of persons suffering the deprivation is certain," thereby ensuring that there were clients with a "continuing live interest in the case." Based on cases like these, commentators have concluded that "courts have come to recognize that an individual plaintiff may continue to represent the interest of others even after any prospect of individual recovery has vanished." *See* Wright, Miller, & Cooper, *Federal Practice & Procedure* § 3533.9 at 391 (1984 & 1996 Supp.).

[5] In support of their mootness argument, Respondents rely upon *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964), stating that "this Court held a denial of mandamus to be moot after the district court corrected the alleged error." Resp. Br. at 14. That is not so; not only did this Court not hold the appeal to be moot, but granted *certiorari* to review the substantive issues raised by the appeal. In its decision, this Court mentioned mootness only in a footnote, and noted that the district court

circumstances, this Court's prior jurisprudence has been interpreted to have in essence "dispensed with the same-party requirement, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without reaching us." *Honig v. Doe*, 484 U.S. 305, 336-37, 108 S. Ct. 592, 611 (1988) (Scalia, J., dissenting) (discussing *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), *Doe v. Bolton*, 410 U.S. 179, 187, 93 S. Ct. 739, 745 (1973), *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 93 S. Ct. 1245, 1249 n.5 (1973), and *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972)) (emphasis in original).[6] Petitioner respectfully

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had corrected a minor issue while the petition for *certiorari* was pending.

Respondents' other citations fair no better, because the facts in those cases make the decisions totally inappropriate here. In *Brockington v. Rhodes*, 396 U.S. 41, 90 S. Ct. 206 (1969), this Court affirmed the Ohio Supreme Court's mootness determination since the petitioner's limited request for relief – placement of his name on an election ballot for a specific position on a specified date – was impossible because the specific election occurred. In *Murphy v. Hunt*, 455 U.S. 478, 102 S. Ct. 1181 (1982), this Court determined that petitioner Hunt would likely never be in a position to demand bail before trial (the substance of the appeal) because he was already subject to serving prison sentences on three different convictions.

[6] As recently followed by the majority in *Honig*, the "capable of repetition" standard is one that is applied flexibly, particularly in matters of public interest. In *Honig*, this Court held that an appeal involving whether or not a state or local school board could unilaterally remove a disabled child from the classroom for dangerous or disruptive conduct growing out of their disabilities (under the Education of the Handicapped Act (20 U.S.C. § 1400, *et seq.*)) was not moot despite the fact that the plaintiff was twenty years old and not enrolled in the

submits that the prudential bar of mootness has no place in this Court's consideration of this Petition.

II.

Respondents' personal attack on the trial judge, and their resolute dedication to the plea of mootness,[7] are but masks to cover their understandable inability to support, in any way, the Seventh Circuit's refusal to follow *Liteky*, and its unprecedented definition of "personal knowledge." Nor do Respondents confront the fact that the new Seventh Circuit rules will wreak havoc throughout the circuit and beyond in trial court attempts to settle cases. Indeed, Respondents' only counter is that Petitioner's "egregious conduct" cannot be likened to efforts to foster settlement. The importance of the questions raised by the

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California state school system. This Court, relying on a host of prior authority, concluded that there was a "reasonable expectation" that plaintiff may once again be part of the California school system and that "[u]nder these circumstances, we think it not only counterintuitive but also unreasonable to assume that respondent will forgo the exercise of a right that he has for so long sought to defend. Certainly we have as much reason to expect that respondent will re-enter the California school system as we had to assume that Jane Roe would again both have an unwanted pregnancy and wish to exercise her right to an abortion." 484 U.S. at 320, 108 S. Ct. at 602 (citing *Roe v. Wade*, 410 U.S. 113, 125, 93 S. Ct. 705, 713 (1973)).

[7] Respondents went so far as to raise their mootness argument in opposing Petitioner's motion to be relieved of the printing requirement (and costs) of Supreme Court Rule 33.2 in filing this Petition.

published Seventh Circuit opinion should not be summarily dismissed by reference to alleged "egregious conduct."[8]

Although recognizing, as they must, that the Seventh Circuit disqualified Petitioner on the alternate ground of partiality under § 455(a), App. 35-39, Respondents' only effort to defend the Seventh Circuit's ruling on that issue is a false and hollow proclamation of "Petitioner's misunderstanding of *Liteky*." Resp. Br. at 15. This strange piece of rhetoric is then followed, not by any explanation of Petitioner's "misunderstanding," but by the observation that the "fair judgment impossible test" does not apply to disqualification under the "personal knowledge" provision of § 455(b)(1). *Id.* Neither the majority opinion in *Liteky*, nor this Petition, holds that it does. Respondents' strawman, moreover, would hide the failure to discuss or reconcile the decision below on partiality under § 455(a), with the cases cited by Petitioner from the Second, Third, Fifth, Ninth, Tenth and Federal Circuits. *See* Pet. at 23. All of these follow the majority opinion in *Liteky* and apply the "impossibility of fair judgment" standard to disqualifications motions filed pursuant to § 455(a).

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[8] Similarly unbecoming and ineffectual is Respondents' argument, Resp. Br. at 19-21, that Petitioner is "unworthy" of the rights afforded him and other district court judges by the Federal Rules of Appellate Procedure that apply to mandamus petitions. In that context, Petitioner notes that regardless of Respondents' alleged conversation with Petitioner's clerk regarding service of Respondents' papers, Resp. Br. at 21 n.11, Respondents falsely attested in their certificate of service that they executed personal service on Petitioner.

With respect to the "personal knowledge" provision of § 455(b)(1), Respondents would distinguish the case law cited by Petitioner, Resp. Br. at 18, on the ground that those cases involve "non-testifying" experts, without explaining why that makes any difference. The restrictions the opinion below imposes on a district court's interaction with experts it appoints pursuant to Rule 706 make no distinction between testifying and non-testifying experts and, of course, neither does Rule 706. Moreover, the experts that are discussed in *United States v. Yonkers Board of Education*, 946 F.2d 180, 184 (2d Cir. 1991) and *Jackson v. Fort Stanton Hospital & Training School*, 757 F. Supp. 1231 (D.N.M. 1990), and in the *Reference Manual on Scientific Evidence*, *see* Pet. at 16-19, are experts appointed pursuant to Rule 706. As has been pointed out, these authorities are in direct conflict with the Seventh Circuit decision in the matter at bar.

CONCLUSION

For all these reasons, the Petition for Writ of Certiorari should be granted.

Dated: Chicago, Illinois
January 16, 1997

Respectfully submitted,

The Honorable Brian Barnett Duff

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